Fulcrum Capital Sdn Bhd v Moriya Kojima and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–02–498 OF 2000 AND NO W–02–501 OF 2000

ABDUL KADIR SULAIMAN, PS GILL AND RAHMAH HUSSAIN JJCA

15 JULY 2004

Civil Procedure — Pleading — Striking out — Statement of claim — Proper party and/or cause of action — No cause of action since no privity to the contract — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c)

The plaintiff commenced an action against the first defendant concerning two loans granted by the latter to GRI (Malaysia) Sdn Bhd ('GRI') and its subsidiary respectively. The plaintiff alleged that the loans were invalid and void by reason of illegality. As against the second defendant, the plaintiff alleged that the sale of the plaintiff's shares in GRI was null and void by reason of misrepresentation. In response to the actions, the defendants filed an application to strike out the plaintiff's statement of claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980. The application was granted by the senior assistant registrar. The defendants appealed to the judge in chamber. The appeal was allowed. Dissatisfied, the plaintiff appealed to the Court of Appeal.

Held, allowing the appeal:

(1) The validity or otherwise of the two loan agreements could be challenged only by bringing in GRI as a party to the action. Standing alone, the present suit against the two defendants cannot be a proper cause of action against them as the plaintiff was not privy to the contracts. As to the sale and purchase agreement concerning the shares, there was a proper resolution passed by the board of GRI approving the transaction (see para 13).

[Bahasa Malaysia summary

Plaintif memulakan satu tindakan terhadap defendan pertama berhubung dengan dua pinjaman yang masing-masingnya diberikan oleh defendan pertama kepada GRI (M) Sdn Bhd ('GRI') dan anak syarikatnya. Plaintif mendakwa bahawa pinjaman tersebut tidak sah dan batal atas sebab salah nyata undang-undang. Berhubung dengan defendan kedua pula, plaintif mendakwa bahawa penjualan saham plaintif di dalam GRI adalah tidak sah dan batal atas sebab salah nyata. Sebagai tindak balas terhadap tindakan-tindakan tersebut, defendan-defendan memfailkan satu permohonan untuk membatalkan pernyataan tuntutan plaintif di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan tersebut dibenarkan oleh penolong kanan pendaftar. Defendan-defendan merayu kepada hakim dalam kamar. Rayuan tersebut dibenarkan. Tidak puas hati, plaintif merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Kesahihan atau tidak kedua-dua perjanjian tersebut hanya boleh dipertikaikan dengan membawa GRI sebagai pihak dalam tindakan ini. Tanpanya, tindakan semasa terhadap kedua-dua defendan bukan satu kausa tindakan yang betul kerana plaintif tidak mempunyai priviti kontrak. Berkenaan perjanjian jualbeli saham, terdapat satu resolusi yang dipersetujui oleh lembaga pengarah GRI yang meluluskan transaksi tersebut (lihat perenggan 13).]

Notes

For cases on striking out of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4677–4737.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1) (a), (b), (d)

Balbindar Singh (Steven Wong with him) (Sri Ram & Co) for the appellant.
PL The (Teh & Assoc) and (Arifin & Partners) for the respondent.

Abdul Kadir Sulaiman JCA:

[1] This is the decision of the court.

[2] With the consent of parties, these two appeals were heard together. They arose out of Civil Action No S1–22–121 of 1996 which commenced in the High Court Kuala Lumpur wherein the respondent in both these appeals is the plaintiff and the appellant in W–02–498 of 2000 is the first defendant and the appellant in W–02–501 of 2000 is the second defendant in the action. For convenience, in this judgment, the parties would be referred to as the plaintiff and the first and second defendants, respectively.

[3] On 25 June 2003, we heard the appeals and by a unanimous decision, the appeals were allowed with costs. We now provide our reasons.

[4] Upon the claim of the plaintiff against the two defendants, the latter by summons in chambers applied for the statement of claim of the plaintiff to be struck out under O 18 r 19(1) (a), (b) and (d) of the Rules of the High Court 1980 ('the RHC'). The application was granted by the senior assistant registrar ('SAR') and the plaintiff then appealed against the decision to the judge in chambers. The learned judge allowed the appeal of the plaintiff. Hence, the present appeals before us.

[5] The plaintiff was a director and a registered owner of 2,499,998 shares in GRI (M) Sdn Bhd ('GRI') comprising of 2,500,000 fully paid up. The remaining two shares belong to his two nominees each owning one fully paid up share. By an agreement dated 31 October 1992 the three shareholders in GRI sold the whole of their shares to the second defendant. By a letter dated 26 January 1993, all the three including the plaintiff,

tendered their resignation as directors of GRI having relinquished all their shares therein. As such, on the date of the filing of the action in the High Court by the plaintiff against the two defendants which was on 20 March 1996, the plaintiff was no longer having any interest in GRI.

[6] GRI was not a party to the action. The action by the plaintiff was over the alleged matters taking place while he was the director of GRI. As against the first defendant, it concerns two short term loans, one granted by the first defendant to GRI for an amount of RM9,000,000 and the other to Citisuccess Sdn Bhd, a subsidiary of GRI, for an amount of RM3,000,000. As against the Second Defendant, it concerns the sale of plaintiff's shares in GRI to the latter by the agreement dated 31 October 1992 mentioned earlier.

[7] In his action against the two defendants, the plaintiff claims for the following reliefs:

(a) a declaration that on the true construction of the various agreements and purported agreements between GRI and/or himself with the first defendant or the second defendant respectively and in the events which have happened, the transaction between them are invalid and void;

(b) a declaration that he is the lawful owner of the 2,499,998 fully paid-up ordinary shares in the capital of GRI;

(c) a declaration that the subsequent sale of the subject land by the second defendant by virtue of the transfer of shares in GRI is null and void.

(d) an order that the moneylending transaction between GRI and the first defendant be reopened and that an account be taken between the parties.

(e) an order that in the taking of such account he and/or GRI may be relieved from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges as the court may adjudge to be reasonable.

(f) costs of the action.

(g) such further or other relief as the court deems fit and proper.

[8] Before the learned judge, two issues were placed. The first being that the personal guarantee by the plaintiff over the two sets of loans totaling RM12,000,000 is not enforceable as the alleged loans by the first defendant to GRI and Citisuccess are void by reason of illegality. The second is that the purported sale of the plaintiff's shares to the second defendant is void by reason of misrepresentation. It is clear, therefore, that the first issue relates to dealings with the first defendant and the second, to dealings with the second defendant. On the first issue, the learned judge said:

> In this regard, the Plaintiff is raising the issue of illegality on the premise that D1 had contravened s 23 of the Moneylenders' Ordinance 1951 by reason of D1 deducting RM1.7m from the full loan to GRI.

[9] On the second issue, the learned judge said: **A**

> In the plaintiff's case, it was alleged that D1 had on 31 October 1992 procured by fraud the execution of SPA between the plaintiff and his nominees on one hand and D2 on the other resulting in the transfer of the entire shares of the plaintiff and his nominees in GRI to D2. D1 has misrepresented to the plaintiff that such agreement was necessary in obtaining an extension of time until 31 Dec 1992 for repayment of loan to D1 when in reality Citisuccess (GRI's subsidiary) had executed an agreement with D1 on the same date for extension of time for repayment of loan. Under SPA (Ex JL '13'), D2 was purported to have acquired the entire shares of the plaintiff and his two nominees in GRI for RM1,000. In contrast, the asset of GRI which comprised the said land was worth RM14m. **B**

[10] For the reason given, the learned judge held that the second **C** defendant is a proper party to this proceeding in connection with the second issue as the second defendant was the purchaser of the plaintiff's shares in SPA (Ex JL '13').

[11] Consequently, based on the two findings, each against the respective **D** defendants, the learned judge held that it is not a proper case for the court to strike out the statement of claim of the plaintiff under O 18 r 19(1)(a), (b) and (d) of the RHC.

[12] With respect, we feel that the reason for holding so was because of the confusion he had over his other finding as follows:

E

> At the hearing, it transpired that both the borrower and the guarantor (the plaintiff) were being sued vide 52–3393 of 1996 in KL Session Court for default repayment of the second loan which case, as agreed by the parties, should be consolidated with the present case in the event that the present case proceed for full trial.

[13] But the learned judge failed to realise that the case before the KL **F** Sessions Court for default of the second loan of RM3,000,000 was an action against the plaintiff as the guarantor and GRI as the borrower, the signatory to the said loan agreement. But in the present case, GRI is not a party to the action initiated by the plaintiff involving the affairs of GRI. He is relying on the two loan agreements involving the first defendant and GRI **G** and Citisuccess, and the sale and purchase agreement over his shares and that of his nominees in their transaction with the second defendant, alleging fraudulent act committed by the first defendant by deceiving him to dispose of his shares in GRI to the second defendant. Neither GRI nor his two nominees is a party in this action as joint plaintiffs or as joint defendants. The validity or otherwise of the two loan agreements could be challenged **H** only by bringing in GRI as a party in the action. Standing alone, his present suit against the two defendants involving GRI, cannot be a proper cause of action against the two defendants. In regard to the loan agreements, the plaintiff is not privy to the contracts vis a vis the first defendant. In regard to the sale and purchase agreement concerning his shares, there was a proper resolution passed by the board of GRI on 26 January 1993. See exh **I** AH5 to the affidavit in support of Abdul Halim bin Abdul Rahman in the application under O 18 r 19(1) of the RHC affirmed on 28 August 1996.

[14] In the upshot, we disagree with the learned judge's finding. short of joining GRI and/or the two nominees, the claim of the plaintiff against the two defendants is doomed to fail. In the circumstance, these two appeals are allowed with costs against the plaintiff. deposits to be refunded to the two appellants. The decision of the SAR is accordingly restored and affirmed.

Appeal allowed with costs, deposits refunded to appellants; decision of senior assistant registrar restored and affirmed.

Reported by I Izzuddin